SQUIRE PATTON BOGGS

The EU Conflict Minerals Regulation

How It Applies in the UK

July 2022

The initial Regulation (EU) 2017/821 of the European Parliament and of the Council laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (the EU Conflict Minerals Regulation) is aimed at reducing the financing of armed conflicts through the trade of valuable minerals.

The initial provisions of the EU Conflict Minerals Regulation took effect in 2017, and the remaining provisions took effect on 1 January 2021.

1. Principles of Retained EU Law

EU regulations, including the EU Conflict Minerals Regulation, are directly applicable as law in an EU member state, without any further action being required to implement them by that EU member state. As part of the Brexit process, EU legislation that applied directly to the UK immediately before 11 p.m. on 31 December 2020 – known as "direct EU legislation" – became what is known as "retained EU law". Retained EU law forms part of UK domestic law. However, where elements of a regulation did not become effective until after 31 December 2020, as is the case with the operative provisions of the EU Conflict Minerals Regulation, those elements do not form part of retained EU law.

2. The EU Conflict Minerals Regulation – Application in England, Scotland and Wales

The core compliance and due diligence requirements imposed on EU importers under the EU Conflict Minerals Regulation came into force starting on 1 January 2021. That means that parts of the EU Conflict Minerals Regulation (mainly dealing with obligations on the EU Commission to determine the scope of the EU Regulation and develop guidance) have applied since 9 July 2017, and, therefore, are retained UK law. However, the key operative provisions of the EU Conflict Minerals Regulation (covering the imposition of due diligence, third-party audits, consultations and reporting obligations on importers) came into effect on 1 January 2021.

As a result, the key operative provisions of the EU Conflict Minerals Regulation are not retained EU law and have not automatically taken effect in England, Scotland and Wales. Therefore, the provisions of the EU Conflict Minerals Regulation that require due diligence, third-party audits, consultations and reporting do not apply to importers into England, Scotland or Wales.

3. The EU Conflict Minerals Regulation – Application in Northern Ireland

The Northern Ireland Protocol to the Withdrawal Agreement between the UK and the EU (the Northern Ireland Protocol) leads to a different result for Northern Ireland. The Northern Ireland Protocol provides that EU law (including specifically the EU Conflict Minerals Regulation) will continue to apply in Northern Ireland. Therefore, importers into Northern Ireland are covered by all aspects of the EU Conflict Minerals Regulation.

While EU regulations are directly applicable without implementing legislation, they leave the setting of enforcement powers and penalties to national governments. The EU Conflict Minerals Regulation is no exception, providing that "Member states shall lay down the rules applicable to infringements of this Regulation." As required, the UK government enacted the Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) Regulations 2020 to set out the enforcement and penalty regime for conflict minerals in Northern Ireland effective 1 January 2021.

In a further development, the Northern Ireland Protocol Bill 2022-23 (NIP Bill) was introduced in the House of Commons on 13 June 2022. The NIP Bill was introduced because the UK government is concerned that the application of the Northern Ireland Protocol undermines the links between Great Britain and Northern Ireland. If enacted, the NIP Bill will designate parts of the Northern Ireland Protocol as an "excluded provision". The effect of being designated an "excluded provision" is that the provision would cease to have direct effect in UK law. If enacted, the NIP Bill would unilaterally override the Northern Ireland Protocol as to those "excluded provisions".

Under the NIP Bill, the part of the Northern Ireland Protocol that relates to the EU Conflict Minerals Regulation is an excluded provision "so far as it relates to qualifying movements of UK or non-EU destined goods". In short, a qualifying movement of goods means any movement of goods to or from Northern Ireland from or to any place outside the EU (including, obviously, England, Scotland or Wales), and any movement of goods within the UK.

There is a debate whether the NIP Bill breaches international law and, if it does, whether it is justified by the doctrine of necessity. However, if it is enacted, the intended overall effect of the NIP Bill would be that the EU Conflict Minerals Regulation (and, therefore, the Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) Regulations 2020) would:

- Apply to importers into Northern Ireland if the goods are destined for onward export to an EU country
- Not apply to importers into Northern Ireland if the goods are to remain in the UK or are destined for another non-EU country

4. The Trade and Cooperation Agreement and References to OECD Guidance

The Trade and Cooperation Agreement (TCA) reached between the UK and the EU on 24 December 2020 makes specific reference to conflict minerals at Article 8.10 (Trade and responsible supply chain management):

> "The Parties recognise the utility of international sector-specific guidelines in the area of corporate social responsibility and responsible business conduct and shall encourage joint work in this regard. **In respect of the OECD Due Diligence Guidance for responsible supply chains of minerals from conflict-affected and high-risk areas and its supplements, the Parties shall also implement measures to promote the uptake of that Guidance.**" (Emphasis added.)

The EU Conflict Minerals Regulation applies in the EU and, as outlined above, until and unless changed by the NIP Bill, it is fully applicable in Northern Ireland, with an enforcement regime set out by the Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) Regulations 2020. In addition, the TCA's commitment to promote the uptake of the OECD's Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Guidance) appears to signal that the UK government will work to make the OECD Guidance mandatory for importers into all parts of the UK.

Developments relating to the OECD Guidance in the UK are likely to emerge from the Foreign, Commonwealth & Development Office (FCDO) and/or the Department for Business, Energy & Industrial Strategy. Guidance issued by the FCDO clearly states, "Businesses have a statutory requirement to comply with the OECD guidance only in Northern Ireland. However, the Government expects all companies importing [tin, tungsten, tantalum and gold] into Great Britain to also comply with the OECD guidance." On the basis of this guidance, we expect that the UK will introduce domestic legislation that, at a minimum, will ensure that all UK importers will be bound to the standards and obligations as set out in the OECD's Guidance. However, as of June 2022, no such legislation has been introduced.

See our alert, The EU Conflict Minerals Regulation and the Labyrinth of Brexit (March 2021), for further detail and discussion of the impact of Brexit on the EU Conflict Minerals Regulation.

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